ATTORNEY FOR APPELLANT:

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

NICOLE (MCCLURE) MASLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 42A01-0712-CR-557
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No.42D01-0712-CR-557

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Nicole Maslin[1] appeals her sentence for reckless homicide, a Class C felony, possession of a schedule II controlled substance, a Class D felony, and maintaining a common nuisance, a Class D felony. Maslin raises two issues, which we restate as whether the trial court abused its discretion in finding the aggravating and mitigating circumstances, and whether Maslin's sentence is inappropriate given the nature of the offenses and her character. Concluding that the trial court did not abuse its discretion and that Maslin's sentence is not inappropriate, we affirm.

Facts and Procedural History

On April 3, 2006, Maslin's boyfriend, Andy Anderson, put two of their children, Kaleb and Ka.M. in the bathtub and left Maslin in charge of watching them. During the day, Maslin had been using Fentanyl,[2] marijuana, and Lortab.[3] Kaleb, who was ten months old, was in a bath seat that clamped to the side of the tub. Maslin lay on a couch, from where she could see her children. Maslin's children had been in the tub for about an hour and a half,[4] when her oldest child, four-year-old Kt.M., arrived home on the bus. Maslin went outside to bring her daughter in, and spoke with the bus driver for six to ten

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[1] Nicole married her current husband and took his surname, Maslin, after being indicted for the instant offenses, but prior to sentencing. At the time of indictment, Nicole's surname was McClure.

[2] Fentanyl, a schedule II prescription drug, is a narcotic pain mediation, similar to, but more potent than morphine. See National Institute on Drug Abuse, at http://www.drugabuse.gov/drugpages/fentanyl.html (last visited May 8, 2008).

[3] Lortab is a prescription opioid pain reliever. See National Institute on Drug Abuse, at http://www.drugabuse.gov/DrugPages/PrescripDrugsChart.html (last visited May 8, 2008).

[4] Maslin testified that her children liked to play in the tub.

minutes regarding a letter she had received about Kt.M. When Maslin returned, she discovered that Kaleb had drowned.

On June 26, 2006, a grand jury indicted Maslin[5] on charges of neglect of a dependant, a Class A felony. On September 11, 2007, Maslin entered into a plea agreement under which she agreed to plead guilty to reckless homicide, possession of a schedule II controlled substance, and maintaining a common nuisance. Pursuant to this agreement, the State agreed to recommend that Maslin be sentenced consecutively on each count, but that the portion of the aggregate sentence served in the Department of Correction be a minimum of six years and a maximum of twelve years. On October 5, 2007, the trial court accepted the plea agreement and held a sentencing hearing. At this hearing, Maslin testified and introduced the testimony of others as to changes she had made in her life after Kaleb's death. Following the hearing, the trial court issued a sentencing order in which it found as aggravating circumstances: 1) Maslin's "history of criminal and delinquent behavior"; 2) the victim was less than twelve years old; and 3) Maslin "was in a position having care, custody, or control of the victim of the offense." Appellant's Appendix at 9-10. The trial court found no mitigating factors. The trial court sentenced Maslin to eight years, all executed in the Department of Correction, for reckless homicide, three years, all suspended to probation, for possession of a schedule II controlled substance, and one year, all suspended to probation, for maintaining a common

[5] Anderson was also indicted on this charge.

nuisance. Therefore, Maslin's aggregate sentence was twelve years, with four years suspended.[6] Maslin now appeals her sentence.

Discussion and Decision

I. Trial Court's Finding of Aggravators and Mitigators

A. Standard of Review

A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

[6] As a condition of probation, the trial court ordered Maslin to serve her probation time in the Wabash Valley Regional Community Corrections Female Work Release Program.

B. Criminal History

Maslin argues that the trial court abused its discretion in finding her criminal history to be an aggravating circumstance. Maslin does not contest the fact that she has a criminal history, but argues that her criminal history is not significant enough to be considered an aggravating circumstance. However, the significance of a criminal history is an inquiry separate from a history's validity as an aggravating circumstance. See Taylor v. State, 840 N.E.2d 324, 341 (Ind. 2006) ("While Taylor's prior criminal history is a valid aggravating circumstance, it would not support a maximum sentence because the crimes were not particularly grave or related to his murder conviction."). As we no longer assess the weight given to aggravating circumstances, we are unable to say that the trial court abused its discretion in finding Maslin's criminal history to be an aggravating circumstance.[7] See Anglemyer, 868 N.E.2d at 491.

We wish to point out, however, that even were we to review the significance of Maslin's criminal history, we would find the trial court acted within its discretion in finding the aggravating circumstance to be significant. Our supreme court has established a standard for assessing a defendant's criminal history; such history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). Maslin has two juvenile adjudications, one for incorrigibility

[7] A trial court is not required to find any criminal history to be an aggravating circumstance.

and one for criminal mischief. She also has convictions of conversion, theft, battery, and driving while suspended, all Class A misdemeanors. All of the convictions stemmed from incidents occurring within six years of the instant offenses, and Maslin pled guilty to the most recent offense, driving while suspended, just over one year prior to the commission of the instant offenses. In fact, it appears that Maslin was still on probation at the time she committed the instant offenses. Although we recognize that none of Maslin's prior convictions were for felonies, all the convictions were for the most serious level of misdemeanor, and one, battery, involved physical harm to others. Although this history is far from the most serious we have seen, it is fairly recent and somewhat related to the instant charges.

C. Mitigating Circumstnaces

1. Guilty Plea

Maslin first argues that the trial court abused its discretion in declining to find her guilty plea to be a mitigating circumstance. We recognize that a guilty plea is often a mitigating circumstance. See Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004). "However, a guilty plea is not inherently considered a significant mitigating circumstance." Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (emphasis in original), trans. denied. If the guilty plea is not a significant mitigating circumstance, a trial court does not abuse its discretion by omitting it from its sentencing statement. See Anglemyer, 875 N.E.2d at 221 (opinion on reh'g). The significance of a guilty plea may be reduced if the defendant has received a substantial benefit in return for the plea. See id.; Patterson v. State, 846 N.E.2d 723, 729 (Ind. Ct. App. 2006). Here, the State

dismissed a Class A felony, which exposed Maslin to a sentence of twenty to fifty years, see Ind. Code § 35-50-2-4, in exchange for a plea that exposed Maslin to a sentence of at most fourteen years,[8] see Ind. Code §§ 35-50-2-6 (sentence for a Class C felony is between two and eight years), 35-50-2-7 (sentence for a Class D felony is between six months and three years). The trial court was clearly aware of Maslin's plea, as it discussed it at the sentencing hearing. Cf. O'Neil v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (recognizing that where the trial court discussed the defendant's guilty plea at the sentencing hearing, it was apparent that the trial court did not overlook the plea); Primmer, 857 N.E.2d at 16-17 (recognizing that the trial court did not overlook the guilty plea where the record indicated that it acknowledged the plea). Given the discretion we give trial courts in assessing the factors at sentencing, we cannot say the trial court abused its discretion in declining to find Maslin's guilty plea to be a significant mitigating circumstance. Cf. Anglemyer, 868 N.E.2d at 493 (recognizing that it is "the trial court's call" whether to find a proffered mitigating factor significant).

2. Maslin's Post-Indictment Attempts at Improvement

Maslin argues that the trial court abused its discretion in failing to find her post-indictment "personal transformation" to be a mitigating circumstance. Appellant's Brief at 15. Specifically, Maslin argues that she has stopped using drugs, participated in counseling, ended her relationship with a drug dealer and married another individual

[8] We point out that the plea agreement did not limit the trial court to an executed sentence of six to twelve years, as the State agreed merely to recommend such a sentence. See Robinett v. State, 798 N.E.2d 537, 540 n.2 (Ind. Ct. App. 2003) (recognizing that a trial court is not bound by mere recommendations in plea agreements), trans. denied.

"about whom no one at the sentencing hearing had a negative comment," earned her G.E.D. and enrolled in college, and has been volunteering in the community. Id. at 16.

We recognize that a defendant's attempts at self-improvement during the pendency of his or her case may be considered a mitigating circumstance. Cf. Davis v. State, 851 N.E.2d 1264, 1268 (Ind. Ct. App. 2006) (discussing the defendant's actions since the commission of the crime in an analysis of the defendant's character under Indiana Appellate Rule 7(B)), trans. denied. However, such efforts are not always significant mitigating circumstances. See Taylor v. State, 840 N.E.2d 324, 340 (Ind. 2006) (proffered mitigating circumstance of defendant's completion of G.E.D. was "sufficiently weak that there was no error in the trial court's failure to consider [it]"); Davis v. State, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005) (holding trial court did not abuse its discretion in declining to find as mitigating circumstances that defendant was a member of a religious organization, had been a "model inmate," obtained his G.E.D., enrolled in college courses, and assisted other inmates during the pendency of his case), trans. denied; Cox v. State, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002) (holding trial court did not abuse its discretion in declining to find as a mitigating circumstance that the defendant "had made significant positive changes in his life and was enrolled in Indiana Business College"). Although we certainly commend Maslin for taking steps on the road to rehabilitation, the trial court was not required to find Maslin's actions to constitute a mitigating circumstance. Given the discretion we give trial courts in the finding of mitigating circumstances, we cannot conclude the trial court abused its discretion in this instance. See Settles v. State, 791 N.E.2d 812, 815 (Ind. Ct. App. 2003) ("It was within

the trial court's discretion to find that [the defendant's] rehabilitation process during his incarceration was not a significant mitigating factor.").

II. Appropriateness of Maslin's Sentence

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer, 868 N.E.2d at 491 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

Here, consecutive advisory sentences would have resulted in an aggregate sentence of seven years, and the maximum sentence the trial court could have imposed for the three offenses was fourteen years. See Ind. Code §§ 35-50-2-6 (advisory sentence for a Class C felony is four years, with a maximum sentence of eight years), 35-50-2-7 (advisory sentence for a Class D felony is one and one-half years, with a maximum of three years). Therefore, the aggregate sentence imposed by the trial court, twelve years with four years suspended to probation, fell above the advisory, but below the maximum sentence allowed. See also, supra, note 7 (recognizing that the trial court was not required to comply with the State's sentencing recommendation).

B. Nature of the Offense

In regard to the nature of the offense, we recognize that it does not appear that Maslin intentionally killed her son. However, this point is largely irrelevant, as intent to kill is not an element of reckless homicide. See Wilkie v. State, 813 N.E.2d 794, 801 (Ind. Ct. App. 2004) (recognizing that the mitigating factor of lack of intent to cause harm did not apply where the defendant was convicted of causing death when operating a motor vehicle with a controlled substance in his body, as "lack of intent to cause death is irrelevant to [that crime]"), trans. denied.

We also note that the victim in this case was extremely young. See Ind. Code § 35-38-1-7.1(a)(3)(indicating that a trial court may consider as an aggravating circumstance that the victim was under twelve years old); Ray v. State, 838 N.E.2d 480, 494 (Ind. Ct. App. 2005) (holding the trial court did not abuse its discretion by assigning the young age of the victim significant aggravating weight), trans. denied. Further, as the

victim's mother, Maslin clearly occupied a position of trust with the victim. See Ind. Code § 35-38-1-7.1(a)(8) (stating that the trial court may consider that the defendant "was in a position having care, custody, or control of the victim"); Howell v. State, 859 N.E.2d 677, 684 (Ind. Ct. App. 2006) (holding trial court properly considered that victim was defendant's son as an aggravating circumstance in a prosecution for reckless homicide), trans. denied; cf. Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) ("Abusing a position of trust is, by itself, a valid aggravator which supports the maximum enhancement of a sentence for child molesting."). These circumstances render Maslin's offense more egregious than the typical offense of reckless homicide. See Frey v. State, 841 N.E.2d 231, 235 (Ind. Ct. App. 2006) (finding that the aggravating circumstances of the victim's age and the fact that the defendant occupied a position of trust with the victim "to be of medium to high weight").

In regard to the offenses of possession of a schedule II controlled substance and maintaining a common nuisance, we note that Maslin not only possessed and used Fentanyl in her house, but also did so, along with marijuana, and Lortabs, while in control of her children. Cf. Redden v. State, 850 N.E.2d 451, 465 (Ind. Ct. App. 2006) (considering fact that children lived in the house where the defendant manufactured methamphetamine in analyzing the nature of the offense), trans. denied; C.A. Bean v. State, 818 N.E.2d 148, 151 n.3 (Ind. Ct. App. 2004) (recognizing that using drugs in the presence of children constitutes a danger to the children).

C. Character of the Offender

In regard to Maslin's character, we recognize that she pled guilty to the offenses. However, as discussed above, the effect that this plea has on our evaluation of her character is tempered because of the significant benefit she received in return. Cf. Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006) (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"), trans. denied.

Maslin also points to her troubled childhood as evidence commenting favorably on her character. Although such evidence of Maslin's troubled childhood is relevant to our analysis, Indiana courts have "consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight." Ritchie v. State, 875 N.E.2d 706, 725 (Ind. 2007); see also Holsinger v. State, 750 N.E.2d 354, 363 (Ind. 2001) (assigning the defendant's troubled childhood "weight in the low range").

We also note that Maslin has amassed two true findings[9] and four criminal convictions prior to the instant offenses. Although, as discussed above, this history is not the most extensive we have seen, such a criminal history still comments negatively on Maslin's character. We also note that Maslin admitted to using illegal drugs during the years preceding the instant offenses, further indicating that Maslin was not leading a law-abiding life. Cf. Drakulich v. State, 877 N.E.2d 525, 536 (Ind. Ct. App. 2007) (analyzing the defendant's character under Rule 7(B) and noting that the defendant "was not living a

[9] See Altes v. State, 822 N.E.2d 1116, 1125 (Ind. Ct. App. 2005) ("[A] trial court's assessment of a defendant's future criminal behavior can properly be based upon the defendant's adult or juvenile criminal history."), trans. denied.

law-abiding life for a period of time"), trans. denied; Roney, 872 N.E.2d at 207 (assessing defendant's character and noting that he had used illegal drugs throughout his life).

Further, the pre-sentence report indicates that Maslin was on probation at the time she committed the instant offenses. "Probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence [at the time he committed the instant offense.]" Ryle v. State, 842 N.E.2d 320, 325 n.5 (Ind. 2005), cert. denied, 127 S.Ct. 90 (2006). This circumstance further comments negatively on Maslin's character. See Barber v. State, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007) (holding that even if the other aggravating circumstance was insignificant, the trial court would have acted within its discretion in ordering maximum sentences based on the fact that the defendant committed the crime while on probation), trans. denied; cf. Ind. Code § 35-38-1-7.1 (trial court may consider fact that a defendant recently violated terms of probation as an aggravating circumstance); Cox v. State, 780 N.E.2d 1150, 1160 (Ind. Ct. App. 2002) (recognizing that a trial court may consider the fact that a defendant recently violated the terms of probation as an aggravating circumstance).

As discussed above, we recognize that Maslin appears to have made tremendous strides toward bettering herself since the commission of the instant offenses. We commend Maslin on her efforts and sincerely hope that she continues such a pattern of productive behavior. However, based on the record, and after giving due consideration to the trial court's decision, we are unable to conclude that she has carried her burden in persuading this court that her sentence is inappropriate.

Conclusion

We conclude the trial court did not abuse its discretion in finding the aggravating and mitigating circumstances and Maslin's sentence is not inappropriate.

Affirmed.

BAKER, C.J., and RILEY, J., concur.